

CLARIFICATION OF CERTAIN AUDIT-RELATED ACTIVITIES IN RELATION TO THE FINANCIAL ADVISORY INTERMEDIARY SERVICES ACT

Introduction

This circular should be read in conjunction with Circular 6/2004 .01
*Guidance for Chartered Accountants in Respect of Financial Advisory
Intermediary Services Act*, issued by The South African Institute of
Chartered Accountants (SAICA).

This circular seeks to clarify whether certain activities, often incidental .02
to audit, accounting and tax services, fall within the ambit of the
Financial Advisory Intermediary Services Act 2002 the FAIS Act (the
Act).

As a result of numerous interventions with the Financial Services Board .03
(FSB) in an attempt to seek clarity in so far as the mentioned activities
are concerned. As a result of these interventions, information was
received from the FSB on how it viewed the questions raised. This
information is communicated in this circular. It should be noted,
however, that the FSB does not issue directives and this circular should
be read in the light of the fact that the clarification given in this
document is no more than an indication of the FSB's thinking and does
not bind the FSB.

Confirmation that activities fall outside the scope of the FAIS Act

The FSB has confirmed our understanding of the following matters: .04

Acting as a trustee

Acting as a trustee of a family or other trust, as long as this is not a .05
regular feature of the business, falls outside the scope of the FAIS Act.

- .06 Even though a trustee may not have discretionary powers, he/she may still be subject to the FAIS Act when rendering intermediary services in relation to financial products under his/her control as trustee.

Providing a consulting function in the restructuring of entities

- .07 This activity normally involves advising a client on how to restructure a company or group of companies in order to streamline or expand the business or to obtain financing. As a result of this advice, the client might decide to issue further share capital, redeem preference shares or take other similar actions. This does not fall within the ambit of the FAIS Act.

Advice on business structures

- .08 Advising on various business structures (e.g. the benefits and appropriateness of different types of entities), in order for the client to decide whether its business should be housed in a private company, public company, close corporation, partnership, etc., falls outside the FAIS Act.
- .09 This advice constitutes the provision of factual information about each of the business structures as well as recommendations on the appropriateness of the various business structures in the specific circumstances. If, for example, a company structure is recommended, the advice could result in the formation of a company and the issue of shares.
- .10 However, the FAIS Act would be applicable if a client is advised to invest in shares of a company.

Valuation of businesses

- .11 The valuation of a business, which is a technical function, does not fall within the ambit of the FAIS Act. Such a valuation can, for example, be done for capital gains tax purposes, or for the purpose of restructuring entities, mergers, take-overs, etc.

Performing share transfer functions

- .12 Performing share transfer functions in respect of shares of non-listed companies falls outside the scope of the FAIS Act, as long as the

function is purely performing the duties of, or similar to those provided by, a company secretary.

The FSB further clarifies this issue by stating that the reference to an 'intermediary' in the Act *"refers to a person forming part of a tripartite (and not a bilateral) arrangement. FAIS concentrates in particular on that person so acting as a 'go-between' or 'in-between' as regards to other parties to the arrangements. The storing of statutory records would also not be subject to the FAIS Act."* .13

However, we are also of the view that share transfer functions do not fall within the ambit of FAIS. The public accountant is only rendering a service to the issuer of shares (product supplier) and not also a client. There is thus only a bilateral arrangement instead of a tripartite arrangement. However, if the public accountant assists in the buying and selling of shares between clients, such public accountant would be rendering an intermediary service." .14

Advising on the tax deduction available for retirement funding

Notifying clients that they are not using their maximum tax deduction relating to retirement funding would not be subject to the FAIS Act. This is purely the provision of factual information. .15

However, the FSB has confirmed that advising clients to increase their retirement funding would constitute the furnishing of advice in terms of the FAIS Act. *"The advice provided may not be appropriate to the client's risk profile and financial needs even though a tax benefit may be obtained"* says the FSB. .16

Excess funds in current bank accounts

Alerting clients to the fact that excess funds are available in their current bank accounts and that these funds earn no or little interest or advising such clients to consider investing such excess funds in order to earn more interest is factual and the FAIS Act would not be applicable. Advising a client in respect of a particular investment (that is, going beyond merely providing information on a range of products without furnishing advice), would bring the process within the ambit of the Act. .17

Advising as to various options, even if no specific financial product is recommended, will fall within the scope of the FAIS Act. .18

Life cover for key individuals

- .19 Alerting clients to the fact that their organisation has not taken out life cover for key individuals and that this might be problematic from a risk management point of view is factual information. However, recommending a client to purchase a particular insurance product will fall within the scope of the FAIS Act.

Activities for which exemption was requested

- .20 In its submission to the FSB, SAICA noted that, on a technical reading of the Act, certain activities might be interpreted as falling within the ambit of the Act if performed “*as a regular feature*” of the business. This significantly broadens the scope of the FAIS Act. Many chartered accountants perform these services, which are purely **incidental** to their audit, accounting or tax services. Therefore, they will have to register as financial service providers, as it could be difficult to demonstrate that these activities are not a regular, albeit immaterial, feature of their business.
- .21 The FSB was requested to consider granting exemption from the FAIS Act for four activities, identified by SAICA. In respect of one of them the FSB was of the opinion that FAIS did not apply. The FSB noted that, after due consideration, it was not satisfied that reasonable grounds exist to grant an exemption from the Act for the other three activities. SAICA will continue to pursue this matter, especially in light of the fact that the amended FAIS Act will be submitted to Parliament shortly, which will, in all likelihood, allow for another comment process.
- .22 The FSB concluded as follows on these activities.

Providing a safe custody facility

- .23 The FSB concluded that providing a safe custody facility for share certificates and storing of other documents, such as statutory records, on behalf of clients are not activities which are subject to the FAIS Act.

Handling of funds for a share transaction – exemption not received

Chartered accountants often perform share transfer functions in respect of shares of non-listed companies where they become involved in receiving the funds from the buyer and paying them over to the seller. Even if the function includes handling funds, in SAICA's view, no advice or intermediary service is involved and we are uncertain whether this would fall within the scope of the FAIS Act. However, the FSB declined to grant exemption from the FAIS Act for this kind of activity where it is a regular feature of the business. .24

Advice to invest excess funds held in current bank accounts – exemption not received

Alerting clients to the fact that excess funds are available in their current bank accounts and that these funds earn no or little interest. Advising on various options, even if no specific financial product is recommended, will fall within the scope of the FAIS Act. .25

In SAICA's view, giving information about the various possible investment options and their return (interest rate) also falls under the provision of factual information. This matter will be pursued. .26

Recommending life cover for key individuals – exemption not received

In the opinion of the FSB advising that life cover should be obtained for key employees, will fall within the scope of the FAIS Act. SAICA does not agree that this is investment advice. In our view it is risk management advice and life cover is the only way in which such a risk can be managed. However, we agree that, recommending or selling a product in this regard, falls within the scope of the FAIS Act. .27

Activities not pursued in the SAICA submissions

The following activities will clearly bring a chartered accountant within the definition of a financial service provider and he/she should therefore obtain the necessary licence for such activities: .28

- The selling of investments and other financial products.
- Control and investment of funds on behalf of clients.

- Assisting clients in diversifying or changing their investment portfolios.
- The administration of a 'Pro-banker' or 'Corporate Saver' type account on behalf of clients.

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**I S Schoole
Chief Executive**