GUIDANCE FOR CHARTERED ACCOUNTANTS IN RESPECT OF
THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT

Introduction
This circular is aimed at providing guidance to chartered accountants and registered accountants and auditors in connection with the requirement to register as a financial service provider (FSP) in terms of Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS). Financial Advisory and Intermediary Services Act, 2002 Guidance Note for Accountants and Auditors” issued by the Financial Services Board addresses the accounting and audit requirements of FAIS can be found on the SAICA website (www.saica.co.za) and the FSB website (www.fsb.co.za).

Who is a financial service provider
An FSP for purposes of FAIS is a person (other than a representative) that furnishes advice and/or renders an intermediary service or furnishes advice and renders an intermediary service in respect of a financial product “as a regular feature of his or her business”.

The following terms as defined in Section 1 of FAIS are included in Appendix C:
- Advice
- Intermediary service
- Person
- Financial product.

The following questions need to be asked when assessing your position on whether or not you are an FSP:
- Do I furnish “advice” or “render” intermediary services?
  - If the answer is “Yes” then the next question to be asked is:
Does the advice furnished or intermediary services rendered relate to any class or classes of “financial products”, as defined?

If the answer is “Yes” then the following question to be asked is:

Do I furnish such advice or render those services as a regular feature of my business?

If the answer to this question is “Yes” then you are an FSP and you are required to comply with the FAIS requirements. In particular, you are required to be licensed in terms of Chapter II of FAIS. The implications of being subject to FAIS are far-reaching.

Appendix A provides a step by step process to be followed in making this determination.

It will be apparent from what has been written above that the question of whether you are required to comply with FAIS is in essence one to be determined by factual considerations. At the heart of these questions is whether you furnish advice and/or render intermediary services "as a regular feature of your business". It is not easy to be specific in advising in relation to the interpretation of this phrase, since much will depend on the factual situation in your business. However, the following guidance can be given in this regard:

- If as a matter of fact your practice regularly provides financial services (as defined) to clients, and especially clients for whom you provide only financial services, you run the risk of falling within the category of an FSP. If for example you have a separate department in your firm concentrating on providing advice in relation to financial products or providing intermediary services in relation to those products, or if you hold yourself out as being able to provide advice or intermediary services in relation to financial products, those will all be indicative of the fact that you provide those services as a regular feature of your business.

- On the other hand, the occasional provision of advice or intermediary services in respect of financial products that is purely incidental to performing the principal service provided by your practice, and not a separate activity alongside your professional business, would indicate that you do not provide "financial services" as a regular feature of your business. There must be an
element of permanence and continuity to the provision of services before it can be said that they are provided as a regular feature of your business.

- The fact that the provision of these services might always be incidental to your professional activities does not necessarily mean that you are not subject to the provisions of FAIS. If you provide financial services regularly, but always only as an adjunct to your professional services, you might nevertheless be held to be an FSP.

- Similarly, the fact that you do not charge for providing financial services does not necessarily exclude you from the provisions of FAIS; the regular provision of financial services as an activity incidental to other professional services, whether or not any charge is made for the financial services, would render you liable to comply with FAIS. As a general statement, however, the fact that you do not charge, directly or indirectly, for providing a financial service will indicate that you do not do so as a regular feature of your business.

**Practical examples for illustration purposes**

The following are examples of what would constitute “advice” in terms of FAIS, if the activities are carried out as a regular feature of a firm’s or practitioner’s business:

- A client has excess funds in a bank current account and a chartered accountant or registered accountant and auditor advising him or her to look at investing the money in a call account to earn more interest. This includes anyone operating any kind of savings scheme in terms of which clients’ money is aggregated in order to obtain a higher rate of interest.

- A chartered accountant or registered accountant and auditor advises the shareholders and directors in a company to purchase life cover on each others’ lives.

- A chartered accountant or registered accountant and auditor recommends to a client that his or her investment portfolio should be more diversified and that a certain portion should be invested overseas.
• When advising a client about the purchase of shares in a business.

• When referring the client to an insurance broker whether on the basis of a commission or not, depending on the type of referral.

.07 The following are examples of what would not constitute “advice” in terms of FAIS, even if provided as a regular feature of the business:

• A chartered accountant or a registered accountant and auditor advises a client about the most appropriate way of financing a new asset and for example, recommends that the asset be leased.

• A chartered accountant or a registered accountant and auditor advises a client company to consider factoring its debtors to improve the company’s liquidity.

• A chartered accountant or a registered accountant and auditor carries out an analysis of a client’s business operations and recommends that certain branches be sold off or that an additional factory be built.

• Valuing the shares in a business for a client whether for capital gains tax purposes or with a view to making an offer to buy them.

**Fit and proper**

.08 The FSP should meet fit and proper requirements in the following areas:

• Personal character

• Competency and operational ability

• Financial soundness.

.09 The regulations do not specifically list any professional qualification (such as CA(SA)) as being sufficient qualification under FAIS, however, it provides for recognition of prior learning. The responsibility is placed upon the FSP to be assessed by an assessor accredited by the South African Qualifications Authority on whether or not he/she meets the fit and proper competency requirements.

.10 Most chartered accountants of registered accountants and auditors, have a degree at National Qualification Framework level 6 or 7 and will be sufficient to meet the competency requirements; the other chartered
accountants or registered accountants and auditors that do not have a degree and have obtained their CA(SA) qualification years ago will be required to be assessed as indicated in paragraph .09 above.

Reference should be made to the subordinate legislation on fit and proper requirements, available on the FSB website.

**Is my whole business subject to FAIS?**

The FAIS requires that the business through which financial services are provided be licensed.

If you are a chartered accountant or registered accountant and auditor rendering professional services, and the financial services in terms of FAIS are offered as part of all other professional services you provide under one entity, then your whole business will be subject to the requirements of FAIS.

If you are a chartered accountant or registered accountant and auditor rendering professional services and you provide financial services in terms of FAIS through a separate entity, and not as part of the entity through which other professional services, for example, accounting services and taxation, are provided, then only the entity formed separately to provide financial services is subject to FAIS, and not the whole professional business.

Therefore a chartered accountant or a registered accountant and auditor that is also an FSP may wish to consider restructuring his/her business taking into account the above implications of FAIS.

**Effects of non compliance**

You are urged to pay close attention to the provisions of FAIS. Any person that contravenes the provisions of FAIS will be guilty of an offence and on conviction will be liable to a fine not exceeding R1 million or to imprisonment not exceeding 10 years, or both. It is accordingly in your interest to ensure that you comply with all provisions of the act.

---

Johannesburg  
June 2004

I Sehoole  
Executive President

Issued June 2004
APPENDIX A

DOES THE ACT AFFECT ME? (AM I AN FSP AS DEFINED IN THE ACT?)

Yes

- Have to register in terms of Section 7 of the Act
  - Complete application in terms of Section 8
    - Register with FSB OR Recognised Body
      - Fee Implication
        - Fit and proper requirements to be fulfilled
          - Personal character qualities of honesty and integrity
          - Competence and operational ability
          - Financial soundness
            - Recommendation made to FSB
              - Licensing Committee
                - Grant Licence
                  - Conditions (possible)
                - Refuse Licence
                  - Reasons for refusal will be given

No

- No action necessary
APPENDIX B

You are advised to visit the Financial Services Board website, www.fsb.co.za, to obtain more detailed information on the following:

- Financial Advisory and Intermediary Services Act, 2002
- Financial Advisory and Intermediary Services Regulations, 2003
- Board Notice 9 of 2004, FAIS licensing certificate to be displayed in terms of Section 8(8)(a) of FAIS
- Guidance note on licence application procedure
- Licensing process and application forms
- List of approved recognised representative bodies
- Exemption of certain financial service providers from the requirements pertaining to audited financial statements and financial soundness
- FAIS subordinate legislation, which, amongst other things, includes the following:
  - Determination of fit and proper requirements of Financial Service Provider
  - Determination of fees payable to the Registrar of Financial Services by providers, 2003
  - Code of conduct for an authorised FSP.
APPENDIX C

Definition of terms

A **Financial services provider** is defined in section 1 of FAIS as meaning -

“any person, other than a representative, who as a regular feature of the business of such person –

(a) furnishes advice; or
(b) furnishes advice and renders any intermediary service; or
(c) renders an intermediary service”.

**Intermediary service** is defined in section 1 of FAIS as meaning -

“subject to subsection (3)(b), any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier -

(a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or
(b) with a view to -

(i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;
(ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or
(iii) receiving, submitting or processing the claims of a client against a product supplier”.
Financial product is defined in section 1 of FAIS as meaning –

“subject to subsection (2) -

(a) securities and instruments, including -

(i) shares in a company other than a “share block company” as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);

(ii) debentures and securitised debt;

(iii) any money-market instrument;

(iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);

(v) any 'securities' as defined in section 1 of the Securities Services Act, 2002;

(b) a participatory interest in one or more collective investment schemes;

(c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively;

(d) a benefit provided by -

(i) a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), to the members of the organisation by virtue of membership; or

(ii) a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956), to the members of the society by virtue of membership;

(e) a foreign currency denominated investment instrument, including a foreign currency deposit;

(f) a deposit as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990);
(g) a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act, 1998 (Act No. 131 of 1998);

(h) any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the Registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act;

(i) any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive;

(j) any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraphs (a) to (l), inclusive.

Advice is defined in section 1 of FAIS as meaning -
"subject to subsection (3)(a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients –

(a) in respect of the purchase of any financial product; or

(b) in respect of the investment in any financial product; or

(c) on the conclusion of any other transaction, including a loan or cession aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or

(d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product, and irrespective of whether or not such advice -

(i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or

(ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected".
However, it should be noted that in terms of section 1(3) of FAIS, “advice” does not include factual advice given merely –

- on the procedure for entering into a transaction in respect of any financial product;
- in relation to the description of a financial product;
- in answer to routine administrative queries;
- in the form of objective information about a particular financial product; or
- by the display or distribution of promotional material; an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objective, financial situation or particular needs of a client.

**Person** is defined in section 1 of the FAIS Act as meaning – “any natural person, partnership or trust, and includes –

(a) any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

(b) any company incorporated or registered as such under any law;

(c) any body of persons corporate or unincorporate”.

Issued June 2004